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Supreme Court, U.S.
F I L E D
JUN 19 1996
CLERK

No. 95-1708

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC.
individually and on behalf of its members;
PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.; KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING COMPANY, A Limited Partnership,
Petitioners

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF OF PETITIONERS 1

1. The Court's reasoning in *44 Liquormart* is applicable to this case 2

2. The lower court's analysis is inconsistent with *44 Liquormart* 5

3. Conclusion 7

TABLE OF AUTHORITIES

Cases **Page(s)**

Anheuser-Busch, Inc., et al. v. Schmoke, Mayor, et al., No. 96-685, 1996 U.S. Lexis 3268 (May 20, 1996) 1

Carey v. Population Services International, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) 2

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). 2, 4

44 Liquormart Inc. and Peoples Super Liquor Stores, Inc. v. Rhode Island and Rhode Island Liquor Stores Association, No. 94-1140, 1996 U.S. Lexis 3020 (May 13, 1996) . . . . . passim

Hospitality Investments of Philadelphia, Inc. v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, No. 94-1247, 1996 U.S. Lexis 3267 (May 20, 1996) 1

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S. Ct. 1646, 56 L. Ed. 2d 155 (1977) 2, 5

Cases **Page(s)**

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986) 3, 5

Rubin v. Coors Brewing Co., 514 U.S. ----, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) 3

United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993) 6

SUPPLEMENTAL BRIEF OF PETITIONERS

On April 22, 1996, Petitioners, Greater New Orleans Broadcasters Association, Inc., along with several of its members (collectively "Broadcasters"), filed a Petition for a Writ of Certiorari, seeking review of a judgment by the United States Court of Appeals for the Fifth Circuit upholding the federal government's ban on broadcast advertisements concerning casino gaming. On May 13, 1996, the Court issued a decision in *44 Liquormart, Inc. and Peoples Super Liquor Stores, Inc. v. Rhode Island and Rhode Island Liquor Stores Association*, No. 94-1140, 1996 U.S. Lexis 3020 (May 13, 1996). The *44 Liquormart* decision provides additional substantial support for the arguments made by Broadcasters in their Petition. Broadcasters contend that, in light of *44 Liquormart*, this matter is appropriate for summary disposition pursuant to Supreme Court Rule 16.1, vacating the judgment rendered by the appeals court and remanding for further consideration in light of *44 Liquormart*.[1] Pursuant to Supreme Court Rule 15.8, Broadcasters hereby submit this Supplemental Brief in order to review the effect of *44 Liquormart* on the issues presented in this matter.

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[1] Shortly after the Court issued its decision in *44 Liquormart*, it vacated and remanded two other lower court decisions that had upheld other commercial speech restrictions. *Anheuser-Busch, Inc., et al. v. Schmoke, Mayor, et al.*, No. 96-685, 1996 U.S. Lexis 3268 (May 20, 1996); *Hospitality Investments of Philadelphia, Inc. v. Pennsylvania State Police Bureau of Liquor Control Enforcement*, No. 94-1247, 1996 U.S. Lexis 3267 (May 20, 1996). In both of those cases, the restrictions had been justified on the basis of paternalistic concerns analogous to those advanced in *44 Liquormart* and here, and in both of those cases, the record reflected a marked lack of evidence supporting the effectiveness of the restrictions under review. Broadcasters submit that this matter is appropriate for summary disposition in the same manner.

1. The Court's reasoning in *44 Liquormart* is applicable to this case.

In *44 Liquormart*, the Court considered a challenge by a liquor store to a Rhode Island statute that forbids advertisements for liquor that feature price information. The state defended the statute as a means of promoting temperance. All nine Justices agreed that the statute violated the First Amendment. The dispute at hand is directly analogous to the one that the Court considered in *44 Liquormart*. Here, as in *44 Liquormart*, the speech restrictions under review concern truthful, non-misleading advertisements for a lawful activity. More significantly, the speech restrictions at issue in this matter, like those under review in *44 Liquormart*, have been justified by the government on the basis of nonspeech policies unrelated to the preservation of a fair bargaining process. Here, as in *44 Liquormart*, the appeals court found inherent merit in the government's arguments that the restrictions at issue would achieve the government's identified goals and therefore did not require the government to adduce specific facts to demonstrate the effectiveness of the restrictions.

Writing the principal opinion in *44 Liquormart*, Justice Stevens stated that regulations that suppress commercial speech in order to pursue a policy not related to consumer protection must be reviewed with "special care." *44 Liquormart, supra* at 28 (citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 (1977); *Carey v. Population Services International*, 431 U.S. 678, 701, n. 28 (1977)). He pointed out that, although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. *Id.* at 30 (citing *Central Hudson Gas & Electric Corp.*

v. Public Service Commission of New York, 447 U.S. 557, 566, n. 9 (1977)). Justice Stevens found that the appeals court erred in assuming that all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. *Id.* at 31. "The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *Id.* (citing *Rubin v. Coors Brewing Company*, 514 U.S. ____, ____ (Slip op., at 1-3)). "When a State regulates commercial messages to protect consumers from misleading, deceptive or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a state entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.*

In addition, Justice Stevens specifically stated that the Court's treatment of a state-imposed ban on gaming advertising in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986), was erroneous inasmuch as it found that such a ban represented a permissible exercise of legislative judgment. *Id.* at 45. "We conclude that a state legislature does not have the broad discretion to suppress truthful nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *Id.* at 46. He concluded that speech prohibitions

of this type "rarely survive constitutional review." *Id.* at 36 (citing *Central Hudson*, 447 U.S. at 566, n. 9).[2]

The reasoning of the principal opinion in *44 Liquormart* is entirely applicable to the matter at hand. Here, the government has asserted that the purpose of its restrictions is to suppress public participation in lawful casino gaming and to bolster the policies of those states that prohibit such gaming at the expense of the policies of the numerous states that permit it. Thus, the restrictions at issue here do not serve the fundamental interest in ensuring a fair bargaining process that *44 Liquormart* identified. Instead, the restrictions serve nonspeech policies that could be directly implemented without regulating speech (for example, by a federal ban on casino gaming). As Justice Stevens noted, "these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy." *Id.* at 33 (citing *Central Hudson,* 447 U.S. at 575, n. 13). As such, the government's advertising ban "rest[s] solely on the offensive assumption that the public will respond

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[2] Justice Scalia, writing separately, expressed discomfort with the *Central Hudson* analysis but concurred with Justice Stevens that the restrictions under review could not survive application of the 4-part *Central Hudson* test. *44 Liquormart, supra* at 58-60. Justice Thomas went further than the principal opinion in his criticism of paternalistic suppression of commercial speech, stating, "In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [*Central Hudson*] should not be applied, in my view. Further, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech." *Id.* at 60-61. Justice O'Connor wrote separately in a concurring opinion joined by Chief Justice Rehnquist and Justices Souter and Breyer. She questioned what she perceived to be displacement of the traditional *Central Hudson* analysis embodied in the principal opinion, but found that the government's speech restrictions could not pass even a less rigorous application of that analysis. *Id.* at 82-83.

'irrationally' to the truth." *Id.* at 35 (citing *Linmark*, 431 U.S. at 96).

2. The lower court's analysis is inconsistent with *44 Liquormart*.

In light of the facially paternalistic basis for the government's ban on casino gaming advertising, the review of the ban provided by the appeals court is wholly inadequate to address the concerns articulated by the Court in *44 Liquormart*. The appeals court simply concluded that the government, in promulgating its arbitrary array of speech restrictions concerning gaming, "made legitimate, quintessentially legislative choices." Pet. App. 11a. In reaching this conclusion, the appeals court relied on the rationale of *Posadas*, which was explicitly rejected in *44 Liquormart*. Pet. App. 9a. Thus, in upholding the arbitrary ban, the level of the lower court's scrutiny fell far short of that required by the Court in *44 Liquormart*. For this reason, the Court should summarily vacate the lower court's judgment and remand this matter for reconsideration in light of *44 Liquormart*.

44 Liquormart also buttresses Broadcasters' argument that, in upholding the government's ban on truthful commercial speech about gaming, the lower court failed to demand the required proof of the ban's effectiveness. In rejecting Rhode Island's arguments concerning the efficacy of its speech restrictions, Justice Stevens stated that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* at 38. Moreover, he specifically found that the mere fact that the plaintiffs had challenged the restrictions in no way provided evidence of

their effectiveness. *Id.* at 39, n.16. He refused to engage in "the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the state takes aim at accurate commercial information for paternalistic ends." *Id.* at 40-41 (citations omitted). In this case, the lower court reviewed a record devoid of any testimony whatsoever regarding the effectiveness of the government's ban on casino gaming advertising. Instead, the court relied upon speculation and conjecture of the sort rejected in *44 Liquormart* to conclude that the subject restrictions materially advance the paternalistic ends laid out by the government. In addition, the lower court improperly relied upon Broadcasters' challenge to the ban as evidence of its effectiveness. Pet. App. 10a. Such reasoning is entirely inconsistent with the guidelines set forth by the Court in *44 Liquormart* and provides an additional reason why the Court should vacate the lower court's judgment.[3]

Finally, Justice Stevens specifically refused to permit less rigorous scrutiny of speech restrictions deemed by the government to pertain to "vice" activities, pointing out that "such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or

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[3] It is noteworthy that the principal opinion, in considering *United States v. Edge Broadcasting Company*, 509 U.S. 418 (1993), distinguished it from *44 Liquormart* by simply noting that in *Edge* the statute at issue was designed to regulate advertising about an activity that had been deemed illegal in the advertiser's jurisdiction. Here, as in *44 Liquormart*, the government's ban aims to suppress speech about an activity that is entirely lawful in Broadcasters' jurisdictions. As Broadcasters pointed out in their Petition, the Court's opinion in *Edge* is consistent with Broadcasters' arguments and provides an additional reason to vacate the lower court's judgment.

playing cards, that may be lawfully purchased on the open market." *Id.* at 53. Here, the lower court made its erroneous support of such a lesser standard of review apparent in its opinion. Pet. App. 14a. Under these circumstances, the Court should vacate the lower court's judgment and remand to the lower court to correct the troublesome precedent that its judgment establishes.

3. Conclusion.

For the foregoing reasons the Court should vacate the judgment of the court of appeals and remand this matter for reconsideration in light of *44 Liquormart*.

Respectfully submitted,

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